Supreme Court, U.S.
FILED
MAY 26 1993
OFFICE OF THE CLERK

92-1890

No. _____

In The

Supreme Court of the United States

October Term, 1992

RENTON SCHOOL DISTRICT NO. 403, *et al.*,

Petitioners,

v.

RICHARD GARNETT, by and through his next friend, Peggy Smith, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

I. FRANKLIN HUNSAKER, III*
SCOTT M. STICKNEY
BULLIVANT, HOUSER, BAILEY, PENDERGRASS & HOFFMAN
300 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204
(503) 228-6351

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the federal Equal Access Act [20 U.S.C. §§ 4071-4074 (1984)] (which makes it unlawful for any public secondary school that receives federal financial assistance and that has a limited open forum to deny equal access to or to discriminate against any students who wish to conduct a meeting within that limited open forum on the basis of the religious content of the speech at such meetings) *implicitly* preempt Washington state constitutional provisions that repeatedly have been construed by the Washington Supreme Court to absolutely prohibit *any* entanglement between public schools and religion and that were construed by the District Court in this matter to preclude Respondents' religion club from meeting at a Washington public high school?

LIST OF PARTIES

Petitioners (Defendants-Appellees in the Ninth Circuit):

Renton School District No. 403
Robert N. Anderson, in his official capacity
Brian Baker, in his official capacity
John G. Dubois, in his official capacity
Marcia K. Holland, in her official capacity
Donald Jacobson, in his official capacity
Gary F. Kohlwes, in his official capacity
Margarita Prentice, in her official capacity

Respondents (Plaintiffs-Appellants in the Ninth Circuit):

Richard Garnett, by and through his next friend, Peggy Smith Scott Germino
Robert Ryan, by and through his next friend, Jack Ryan
Richard Tracy, by and through his next friend, Michael Tracy
Stephen M. Hanning, a minor, by Mr. and Mrs. Bruce Sharp, his Guardians Ad Litem
Tanya M. Hanning, a minor, by Mr. and Mrs. Bruce Sharp, her Guardians Ad Litem
Robert M. Mayer, a minor, by Mr. and Mrs. Michael L. Mayer, his Guardians Ad Litem
Jaime R. Mayer, a minor, by Mr. and Mrs. Michael L. Mayer, her Guardians Ad Litem

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

The issue of whether the federal Equal Access Act preempts provisions of the Washington Constitution is one of exceptional importance and first impression. The District Court correctly ruled that (1) the Supremacy Clause of the federal Constitution does not bar the Washington Constitution from limiting application of the Equal Access Act, and (2) the Washington Constitution, as construed by the Washington Supreme Court, clearly precludes application of the Equal Access Act in Washington to allow the students' religion club to meet on public high school premises. The Ninth Circuit erred in reversing that ruling on the basis that the Equal Access Act implicitly preempts the Washington Constitution. 7

CONCLUSION 18

LIST OF APPENDICES

Page

APPENDIX A
March 8, 1993 Opinion of the United States Court of Appeals for the Ninth Circuit A-1

APPENDIX B
April 27, 1993 Order of the United States Court of Appeals for the Ninth Circuit B-1

APPENDIX C
August 15, 1991 Opinion ("Order on Remand") of the United States District Court, Western District of Washington at Seattle C-1

APPENDIX D
Equal Access Act [20 U.S.C. §§ 4071-4074 (1984)] ... D-1

Washington Constitution, Article I, section 11 .... D-4

Washington Constitution, Article IX, section 4 .... D-5

U.S. Constitution, Article VI, Clause 2 ..... D-5

TABLE OF AUTHORITIES

Page

CASES

Board of Education v. Mergens 496 U.S. 226 (1990). . . . *passim*

Board of Education v. Pico 457 U.S. 853 (1982) 17

California Federal S. & L. Assn. v. Guerra 479 U.S. 272 (1987) 9, 16

Epperson v. Arkansas 393 U.S. 97 (1968) 17

Gade v. National Solid Wastes ___ U.S. ___, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) 17

Garnett v. Renton School Dist. 772 F. Supp. 531 (W.D. Wash. 1991) . . . . . *passim*

Garnett v. Renton School Dist. No. 403 675 F. Supp. 1268 (W.D. Wash. 1987) 5

Garnett v. Renton School Dist. No. 403 865 F.2d 1121, *modified*, 874 F.2d 608 (9th Cir. 1989) 5-6

Garnett v. Renton School Dist. No. 403 496 U.S. 914 (1990) 6

Garnett v. Renton School Dist. No. 403 987 F.2d 641 (9th Cir. 1993) . . . . . *passim*

Louisiana Public Service Com. v. FCC 476 U.S. 355 (1986) 9

Maryland v. Louisiana 451 U.S. 725 (1981) 16

Meyer v. Nebraska 262 U.S. 390 (1923) 17

Northwest Pipeline v. Kan. Corp. Com. 489 U.S. 493 (1989) 9

Oregon v. Hass 420 U.S. 714 (1975) 8

TABLE OF AUTHORITIES – Continued

Page

Pierce v. Society of Sisters of Holy Names 268 U.S. 510 (1925) 17

Pruneyard Shopping Center v. Robins 447 U.S. 74 (1980) 8

Rice v. Santa Fe Elevator Corp. 331 U.S. 218 (1947) . 16-17

Weiss v. Bruno 82 Wash. 2d 199, 509 P.2d 973 (1973) 12

Widmar v. Vincent 454 U.S. 263 (1981) 14

Witters v. State, Com'n for the Blind 102 Wash. 2d 624, 689 P.2d 53 (1984), *rev'd sub nom on other grounds, Witters v. Wash. Dept. of Serv. for Blind,* 474 U.S. 481 (1986) 8-9

CONSTITUTIONAL AND STATUTORY PROVISIONS

Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676.... 11-12

U.S. Const. amend. I. 5

U.S. Const. amend. XIV 5

U.S. Const. art. VI, cl. 2 2

20 U.S.C. §§ 4071-4074 (1984) ..... *passim*

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 4

28 U.S.C. § 1343 4

Wash. Const. art. I, § 11 ..... *passim*

Wash. Const. art. IX, § 4 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE HISTORY

130 Cong. Rec. S2883 (daily ed. March 20, 1984) 13

130 Cong. Rec. S8355 (daily ed. June 27, 1984) 14

No. _____

In The

Supreme Court of the United States

October Term, 1992

RENTON SCHOOL DISTRICT NO. 403, *et al.*,

Petitioners,

v.

RICHARD GARNETT, by and through his next friend, Peggy Smith, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit (filed on March 8, 1993), which reversed an Order (filed on August 15, 1991) of the United States District Court for the Western District of Washington at Seattle.

OPINIONS BELOW

The Opinion of the Ninth Circuit is reported at 987 F.2d 641 and is reprinted herein as Appendix A.

The opinion ("Order on Remand") of the United States District Court for the Western District of Washington at Seattle is reported at 772 F. Supp. 531 and is reprinted herein as Appendix C.

JURISDICTION

The Opinion and Judgment of the Ninth Circuit were filed on March 8, 1993. [The Ninth Circuit entered an Order on April 27, 1993 denying Petitioners' Petition Suggesting Rehearing *En Banc* (*see* Appendix B).] This Court has jurisdiction to review the Judgment and Opinion pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portions of the following statutes and constitutional provisions are reprinted herein as Appendix D:

1. Equal Access Act, 20 U.S.C. §§ 4071-4074 (1984) (D-1);

2. Washington Constitution, Article I, section 11 (D-4);

3. Washington Constitution, Article IX, section 4 (D-5); and

4. U.S. Constitution, Article VI, Clause 2 (D-5).

STATEMENT OF THE CASE

Renton School District No. 403 ("the School District") is a governmental entity that receives federal financial assistance and is managed by the Board of Directors ("the Board") of the School District and the District Superintendent. The School District oversees the operation of Lindbergh High School ("LHS"), a public secondary school in Renton, Washington.

Pursuant to School District Policy, Petitioners provide LHS students the opportunity to meet as officially recognized and formally authorized student clubs. Those clubs may freely use school facilities and meet on school premises during noninstructional time – before or after actual classroom instruction.

In order to meet as an officially recognized and formally authorized student group or club, the club must either be listed on the School District's Master List of Clubs, Activities and Trips ("the Master List") or be given interim approval to meet by the Superintendent, subject to the Board's decision whether to add the group or club to the Master List.

The Master List is prepared by the Superintendent's office and presented with recommendations to the Board for approval, modification or revision. Those recommendations, as well as the Board's decisions regarding the recommendations, are made under a School District Policy, which sets forth specific guidelines or "criteria" that are used for approving student groups or clubs.

Respondents ("the students") are current and former LHS students. They are current and former members of a

student religion group initially known as "Club Action" and then "Hi-Tops" ("the students' religion club"). The students applied to the School District for permission to meet on the LHS campus as an officially recognized and formally authorized group. Their expressed purpose was to discuss religious and moral issues, read the Bible, sing and pray. Pursuant to its Policy, the School District denied the request because it believed that the students' religion club was not curriculum-related and also because the School District believed that the religious nature of the students' club not only would have resulted in the School District violating the Establishment Clause of the United States Constitution, but also Article I, section 11, and Article IX, section 4, of the Washington Constitution, which provide:

> *Article I, section 11*:
>
> No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.
>
> *Article IX, section 4*:
>
> All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

The students filed this lawsuit under 28 U.S.C. §§ 1331 and 1343 for declaratory and injunctive relief to compel Petitioners to allow the students' religion club to meet on LHS premises with the official sanction and formal authorization of the Board. The students contended that Petitioners' refusal to allow the meetings violated the students' (1) statutory rights to "equal access" to a "limited open forum" under the Equal Access

Act, (2) constitutional rights to freedom of speech and association under the First Amendment of the federal Constitution, (3) constitutional rights to the free exercise of religion without governmental discrimination under the religion clauses of the First Amendment of the federal Constitution, and (4) constitutional rights to equal protection under the Fourteenth Amendment of the federal Constitution.

In the first District Court decision in this matter – *Garnett v. Renton School Dist. No. 403*, 675 F. Supp. 1268 (W.D. Wash. 1987) (*"Garnett I"*) – the Court ruled against the students on two independent grounds: (1) Petitioners did not create a "limited open forum" for purposes of applicability of the Equal Access Act, and (2) even if a "limited open forum" had been created, the Equal Access Act by its own terms cannot operate to require activity prohibited under the Washington Constitution (Article I, section 11, and Article IX, section 4).[1] 675 F. Supp. at 1270-76, 1277.

The Ninth Circuit affirmed the District Court's decision on the basis that LHS did not have a "limited open forum" as defined by the Equal Access Act and, therefore, the Equal Access Act requirements did not apply. *Garnett*

---

[1] The District Court did not address the challenged constitutionality of the Equal Access Act under the federal Constitution, and it also ruled that the students' rights under the federal Constitution of free speech, association, equal protection and exercise of religion were not infringed. *Garnett I*, 675 F. Supp. at 1270, 1276-77.

v. Renton School Dist. No. 403, 865 F.2d 1121, *modified*, 874 F.2d 608, 613-14 (9th Cir. 1989).[2]

This Court reversed and remanded the Ninth Circuit's decision in light of *Board of Education v. Mergens*, 496 U.S. 226 (1990) ("*Mergens*"). *Garnett v. Renton School Dist. No. 403*, 496 U.S. 914 (1990). Consequently, the Ninth Circuit subsequently entered an Order remanding this matter to the District Court for further consideration in light of *Mergens*.

On remand, the District Court again denied the students relief on the ground that, although Petitioners had created a "limited open forum" as defined by the Equal Access Act and as interpreted by the Supreme Court in *Mergens*, the Act does not require violation of state laws and constitutional rights. Therefore, the District Court again ruled that the Washington Constitution precludes the use of LHS public school premises by the students' religion club. *Garnett v. Renton School Dist.*, 772 F. Supp. 531, 535-38 (W.D. Wash. 1991) ("*Garnett II*") (App. C-7-15).

The Ninth Circuit reversed the ruling of the District Court on remand and ruled that the Equal Access Act *implicitly* preempts the Washington state constitutional provisions that the District Court ruled preclude the students' religion club from meeting on LHS public school premises. 987 F.2d 641 (1993) (App. A-7-14). It is that Opinion that this Petition for Writ of Certiorari addresses.

---

[2] The Ninth Circuit also rejected the students' claims under the federal Constitution. 874 F.2d at 610-13.

REASONS FOR GRANTING THE WRIT

The issue of whether the federal Equal Access Act preempts provisions of the Washington Constitution is one of exceptional importance and first impression. The District Court correctly ruled that (1) the Supremacy Clause of the federal Constitution does not bar the Washington Constitution from limiting application of the Equal Access Act, and (2) the Washington Constitution, as construed by the Washington Supreme Court, clearly precludes application of the Equal Access Act in Washington to allow the students' religion club to meet on public high school premises. The Ninth Circuit erred in reversing that ruling on the basis that the Equal Access Act implicitly preempts the Washington Constitution.

This case involves a question of exceptional importance, and one that is of first impression: Does the federal Equal Access Act *implicitly* preempt Washington state constitutional provisions that repeatedly have been construed by the Washington Supreme Court to absolutely prohibit *any* entanglement between the Washington public schools and religion (provisions that the District Court in this matter ruled preclude the religion club meetings sought by the students on public high school premises)?

The exceptional importance of this issue is made apparent by the fact that the Ninth Circuit's Opinion recognized that this question is likely to recur because "[m]any states have [similar] establishment clauses that are more restrictive than the federal establishment clause" and "[t]hese state constitutional provisions might bar religious meetings on school grounds." (987 F.2d at 646; App. A-12) Indeed, the author of the Ninth Circuit's Opinion wrote a separate concurring opinion in which he

stated that the Court's ruling "is no minor intrusion" on the sovereign power and comprehensive authority of Washington and other states to prescribe and control the conduct of public schools. (Farris, J., concurring, 987 F.2d at 647; App. A-14)

The District Court correctly ruled that the Supremacy Clause (Article VI, Clause 2) of the federal Constitution does not bar the Washington Constitution from limiting application of the Equal Access Act. (*Garnett II*, 772 F. Supp. at 537-38; App. C-12-15) The Ninth Circuit's Opinion reversing that ruling obliterates longstanding state constitutional provisions that consistently have been construed to prohibit *any* entanglement between public schools and religion.[3] The Ninth Circuit's Opinion, which is based on *implied* preemption of the Washington Constitution by the federal Equal Access Act, not only does irreparable harm to the sovereignty of the state but also is suspect in light of this Court's precedent on the issue of preemption.

This Court consistently has held that state courts may interpret state constitutions to be more protective of individual rights than the federal Constitution. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); *Oregon v. Hass*, 420 U.S. 714, 719 n.4 (1975). This Court specifically has recognized that Washington state courts are "free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution" with respect to the establishment of religion. *Witters v. State,*

---

[3] *See* the concurring opinion of Judge Farris (987 F.2d at 646-48; App. A-15-16) and the Washington Supreme Court cases cited and discussed therein.

Com'n for the Blind, 102 Wash. 2d 624, 689 P.2d 53 (1984), *rev'd sub nom on other grounds, Witters v. Wash. Dept. of Serv. for Blind*, 474 U.S. 481, 489 (1986).

As discussed in *Northwest Pipeline v. Kan. Corp. Com.*, 489 U.S. 493, 509 (1989), federal law preempts state law under the Supremacy Clause only in certain situations, none of which is present in this matter:

> Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.

(Citations omitted); *see also California Federal S. & L. Assn. v. Guerra*, 479 U.S. 272, 280-81 (1987); *Louisiana Public Service Com. v. FCC*, 476 U.S. 355, 368-69 (1986).

Neither the legislative history nor the plain language of the Equal Access Act supports preemption of the Washington Constitution. As the District Court correctly held, "[t]he Act contains no clear expression of congressional intent to preempt state law." (*Garnett II*, 772 F. Supp. at 537; App. C-13) Rather, the Act (in Section 4074) only expressly refers to superseding, inconsistent *federal* law:

> The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

It also is clear from the plain language of the Equal Access Act that Congress did not legislate so comprehensively as to occupy an entire field of regulation. The Act itself, in Sections 4071(d)(5) and (7), allows for state law to supplement it.[4] As the District Court correctly concluded:

> The Act does not, however, comprehensively occupy the entire field and specifically refers to the continuing effectiveness of State laws and constitutional rights.

(*Garnett II*, 772 F. Supp. at 538; App. C-15)

The provisions of the Washington Constitution do not conflict with the Equal Access Act. It is possible to comply with both the mandates of the Washington Constitution and the provisions of the Equal Access Act, as the Act does not require a public school "to sanction meetings that are otherwise unlawful . . . or to abridge the constitutional rights of any person." 20 U.S.C.

---

[4] The Equal Access Act provides in pertinent part:

> Nothing in this [Act] shall be construed to authorize the United States or any State or political subdivision thereof –
>
> . . . .
>
> (5) to sanction meetings that are otherwise unlawful; [or]
>
> . . . .
>
> (7) to abridge the constitutional rights of any person.

20 U.S.C. §§ 4071(d)(5) and (7).

§§ 4071(d)(5) and (7).[5] Therefore, Petitioners are not required to allow the students' religion club to meet under the Act because it clearly would be unconstitutional under the Washington Constitution to allow the club to meet on public school premises.[6]

The provisions of the Washington Constitution that preclude the students' religion club from meeting on public high school premises do not conflict with the Equal Access Act because those provisions do not stand as an obstacle to the accomplishment and execution of congressional objectives. In the Enabling Act allowing creation of the state of Washington, Congress "commanded" that the Washington Constitution contain the following:

> [P]rovision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all children of said State, and free from sectarian control.

---

[5] As also noted by this Court in *Mergens* (496 U.S. at 241) and by Judge Farris in his concurring opinion in this matter (987 F.2d at 647; App. A-17), in order to avoid the obligations of the Act a school district may simply restructure its curriculum or close its forum.

[6] In its Opinion, the Ninth Circuit ruled that the reference in Section 4071(d)(7) to "constitutional rights" somehow refers only to federal constitutional rights. (987 F.2d at 645; A-11) That construction ignores the fact that Congress expressly used the adjective "federal" in Section 4074 in referring to "other provisions of Federal law" that are superseded by the Equal Access Act. Therefore, the Ninth Circuit erred in inserting into Section 4071(d)(7) a term that appears to intentionally have been omitted by Congress.

Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, as quoted in *Garnett II*, 772 F. Supp. at 538; App. C-14-15. The authors of the Washington Constitution added the words "or influence" after those of "sectarian control" and embodied the Congressional mandate in Article IX, Section 4 of that state Constitution. The District Court stated that "[t]he proscription of 'influence' as well as 'control' by sectarian elements was a conscious decision" (*Garnett II*, 772 F. Supp. at 536; App. C-10), and in that regard the Court quoted the following from *Weiss v. Bruno*, 82 Wash. 2d 199, 206, 509 P.2d 973, 978 (1973):

> It is indisputable that this more restrictive clause was the deliberate design of the framers of our constitution. The statehood compact with the United States required that provision be made for a public school system free from sectarian *control*. . . . Obviously not satisfied with the broader concept of control, the authors of our constitution added the words "or influence." A motion to strike those words failed.

[*Garnett II*, 772 F. Supp. at 536; App. C-10 (emphasis in original, citations omitted)]

Therefore, by prohibiting sectarian control or influence in public schools, the state of Washington did not act contrary to the objectives of Congress. Indeed, the District Court stated its belief that Congress intended that the Washington Constitution preclude sectarian control in public schools, that is what the framers of the Washington Constitution accomplished, and Congress was aware of that in enacting the Equal Access Act:

> Congress was surely aware [when enacting the Equal Access Act] of provisions in the Washington constitution that mandate absolute separation of government and religion. Senator Slade Gorton specifically referred to Washington's constitutional provision in commenting upon a proposed Constitutional amendment prior to the Congress enacting the Equal Access Act.[7] State constitutional provisions were not

---

[7] That congressional awareness is evidenced by the fact that, as noted by the District Court, several months before passage of the Equal Access Act Senator Gorton drew upon his knowledge of the Washington Constitution to convince his colleagues of the importance of respecting states' rights and state constitutional provisions when considering passage of a constitutional amendment that would have required equal access:

> This proposed amendment, Mr. President, is largely a permissive one. That is, it does not relieve State officials of the necessity of complying with the laws of the State or with the State constitutions as long as those laws and constitutions do not inhibit the constitutional guarantees for the free exercise of religion.
>
> In my own State of Washington, for example, the State constitution is much more rigid in prohibiting religious exercise, observances, or the like, in public schools, or in prohibiting the use of any tax moneys that can help religious organizations directly or indirectly, than is the first amendment to the Constitution of the United States.
>
> As a general proposition, nothing in this amendment – and I suspect nothing in any of the other amendments which are being discussed on the floor of the Senate at the present time – would undermine those State constitutional provisions.

130 Cong. Rec. S2883 (daily ed. March 20, 1984). It is significant that when the Equal Access Act was enacted in lieu of a constitutional amendment, Congress provided in the Act

> preempted by virtue of [Sections] 4071(d)(5) and (7) [of the Act].

[*Garnett II*, 772 F. Supp. at 537-38; App. C-14 (citation omitted; footnote added)]

The congressional objective in enacting the Equal Access Act was to codify the equal access guarantees of *Widmar v. Vincent*, 454 U.S. 263 (1981), and to extend the holding of *Widmar* to public secondary schools. *See* 130 Cong. Rec. S8355, 8356 (daily ed. June 27, 1984) (statements of Sens. Levin and Bumpers). *Widmar* involved the rights of college students to free exercise of religion, equal protection and freedom of speech under the First and Fourteenth Amendments of the federal Constitution, and this Court in that case held that the university could not exclude a student religion club under those constitutional provisions. Surely Congress knew that the equal access guarantees of *Widmar*, which Congress intended to apply to secondary schools through the Equal Access Act, did not include a guarantee that a stricter separation between church and state mandated by a state constitution such as Washington's would be overridden by federal law.

The legislative history of the Equal Access Act evidences that Congress wanted to provide that, if a school allows student-initiated and noncurriculum-related student groups to meet, the school must allow other groups to meet to discuss religious, political, philosophical or

---

[§§ 4071(d)(5) and (7)] that state constitutional provisions are not preempted.

other issues, but not in violation of any state constitutional prohibition against such meetings. The District Court correctly ruled in this matter:

> The [Equal Access] Act . . . is entirely devoid of *any* manifestation of intent to require schools to violate statutory or constitutional provisions. Indeed, the Act explicitly allows local authorities to comply with state statutory and constitutional provisions. There is no intent to displace the Washington constitution.

[*Garnett II*, 772 F. Supp. at 538; App. C-15 (emphasis in original)]

There certainly is no legislative history indicating an explicit or even implicit congressional intent to preempt the Washington Constitution. The reliance by the Ninth Circuit on *Mergens* (at 987 F.2d 645-46; App. A-11-13) as supporting an *implied* preemption in this matter is questionable given the fact that *Mergens* did not even involve a state law or state constitutional provisions that, as are involved in this matter, clearly preclude meetings of student religious groups or clubs on public high school premises. In *Mergens*, this Court limited its focus to interpreting and defining the phrase "noncurriculum-related student groups" found in Section 4071(b) of the Equal Access Act. While this Court broadly defined *that* phrase to accomplish the purposes of the Act, the Court did so on the basis that to do otherwise would render the Act meaningless and would enable school districts to evade the Act. There are different provisions of the Act at issue in this matter than were at issue in *Mergens*, provisions that are plain on their face – §§ 4071(d)(5) and (7). The District Court concluded that those provisions do not

require Petitioners to permit meetings on school property that are "unlawful" or "unconstitutional" under state law. That ruling would not render the Equal Access Act meaningless because Petitioners obviously have no control over state laws or constitutional provisions, whereas the school district in *Mergens* could control its curriculum to avoid the Act and therefore render the Act meaningless, as this Court ruled.[8]

The Ninth Circuit's Opinion in this matter ignores a well-settled principle based on precedent of this Court that should apply to this matter: The basic presumption is that Congress, in enacting the Equal Access Act, did not intend to displace the Washington Constitution [*see, e.g., Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)], and congressional intent to preempt the Washington Constitution should not be lightly inferred [*see, e.g., California Federal S. & L. Assn. v. Guerra*, 479 U.S. at 281]. Moreover, the Ninth Circuit's Opinion ignores another well-established principle that, where a federal statute is in a field that traditionally has been occupied by the states, the courts "start with the assumption that the historic police powers

---

[8] This Court in *Mergens* recognized that the purpose of the Equal Access Act, as clearly evidenced by the legislative history, was to respond to federal court decisions refusing to allow student religious groups to meet on public school premises on the basis that to do so would violate the federal Establishment Clause. Surely a congressional recognition that equal access meetings would not violate the federal Establishment Clause is not the same as requiring equal access where such access would violate longstanding state constitutional prohibitions. A statement that equal access is permissible does not demonstrate a clear congressional intent to preempt a state constitution, especially in an area traditionally left to state and local control.

of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). That assumption provides the assurance that the federal-state balance "is not disturbed *unintentionally* by Congress or unnecessarily by the courts." *Gade v. National Solid Wastes*, ___ U.S. ___, 112 S. Ct. 2374, 2392, 120 L. Ed. 2d 73 (1992) (emphasis added).

In the absence of clear congressional intent, a court should not presume preemption of the Washington Constitution by the Equal Access Act, particularly where the federal government has little involvement in public schools except for the fact that federal funds are involved. The Ninth Circuit's Opinion ignores precedent of this Court that recognizes the comprehensive authority of the states to prescribe and control the conduct of public schools.[9] The Ninth Circuit's Opinion "leads to a sweeping intrusion by the Federal Government into the operation of our public schools, and does so despite the absence of any indication that Congress intended to divest local school districts of their power to shape the educational environment." *Mergens*, 496 U.S. at 290 (Stevens, J., dissenting).

---

[9] *Board of Education v. Pico*, 457 U.S. 853, 863-64 (1982); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Pierce v. Society of Sisters of Holy Names*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

CONCLUSION

The Judgment entered by the District Court for Petitioners was correct and should be affirmed. The Ninth Circuit's Opinion (based on an *implied* preemption of the Washington state Constitution by the federal Equal Access Act) reversing that Judgment should be reviewed and reversed by this Court.

DATED: May 25, 1993.

Respectfully submitted,

I. FRANKLIN HUNSAKER, III*
SCOTT M. STICKNEY
BULLIVANT, HOUSER, BAILEY,
PENDERGRASS & HOFFMAN

Attorneys for Petitioners

*Counsel of Record

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD GARNETT, by and through his next friend, Peggy Smith; SCOTT GERMINO; ROBERT RYAN, by and through his next friend, Jack Ryan; RICHARD TRACY, by and through his next friend, Michael Tracy; STEPHEN M. HANNING, a minor, by Mr. and Mrs. Bruce Sharp, his Guardians Ad Litem; TANYA M. HANNING, a minor, by Mr. and Mrs. Bruce Sharp, her Guardians Ad Litem; ROBERT M. MAYER, a minor, by Mr. and Mrs. Michael L. Mayer, his Guardians Ad Litem; JAIME R. MAYER, a minor, by Mr. and Mrs. Michael L. Mayer, her Guardians Ad Litem, *Plaintiffs-Appellants,* v. RENTON SCHOOL DISTRICT No. 403; ROBERT N. ANDERSON, in his official capacity; BRIAN BAKER, in his official capacity; JOHN G. DUBOIS, in his official capacity; MARCIA K. HOLLAND, in her official capacity; DONALD JACOBSON, in his official capacity; GARY F. KOHLWES, in his official capacity; MARGARITA PRENTICE, in her official capacity, *Defendants-Appellees.*	No. 91-36036 D.C. No. CV87-1294-WTM OPINION

Appeal from the United States District Court
for the Western District of Washington
Walter T. McGovern, District Judge, Presiding

Argued and Submitted
January 5, 1993 – Seattle, Washington

Filed March 8, 1993

Before: Eugene A. Wright, Jerome Farris, and
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Farris; Concurrence by Judge Farris

SUMMARY

Individual Rights/Religious Freedom/Government Law/Education/Civil Litigation/Preemption

The court of appeals reversed a district court judgment, holding that a provision in the State of Washington's constitution prohibiting student religious meetings on school grounds was preempted by the federal Equal Access Act.

Appellants, a number of students at a public high school in Renton, Washington, formed a religious club and sought permission from school authorities to meet on school grounds. The school denied their request, stating that such meeting would violate both the state and federal constitutions. The students brought suit under the federal Equal Access Act, which provides that public secondary schools receiving federal funding may not deny access to their facilities for such uses where the schools have created a "limited open forum" by allowing other noncurriculum related student groups to meet on

school premises during noninstructional time. The district court found that the Act did not apply because the school did not have a limited open forum. The court of appeal affirmed. The Supreme Court vacated the decision and remanded. The district court then found that the school had created a limited local open forum but also found that the state constitution precluded religious meetings and that the Act did not preempt the state constitution. The students again appealed.

[1] The Act does not explicitly preempt state law. [2] The students argued that sections 4071(d)(5) and (7) do not allow state law to override the Act's requirements. [3] Applicability of the Act turns on the meaning of those provisions. [4] Section 4071(d)(5) is most logically understood as authorizing schools to bar meetings that are unlawful for reasons other than religious content. [5] Section 4071(d)(7) is a "savings" clause that protects against reading implications into the Act which might abridge federal constitutional rights. [6] Confronted with a similar task of statutory interpretation, [7] the Supreme Court looked to the legislative purpose of the Act to determine the meaning of "noncurriculum related" and held that a broad reading was consistent with the goal of those who sought to end discrimination. [8] The Supreme Court's finding of a broad legislative purpose suggests that Congress intended to preempt state law. [9] The students had a right under the Act to meet on school property on the same basis as other noncurriculum related clubs.

Judge Farris concurred. He agreed with the district court's finding that the state constitution barred the meetings but also agreed with the majority that Congress

intended to preempt state law. He noted that this ruling intruded on state sovereignty and observed that Congress has made it more difficult for states to maintain sturdier walls between church and state than the barrier recognized by the Supreme Court.

COUNSEL

Michael Stokes Paulsen, Minneapolis, Minnesota; Michael W. McConnell, Mayer, Brown & Platt, Chicago, Illinois, for the plaintiffs-appellants.

I. Franklin Hunsaker, Bullivant, Houser, Bailey, Pendergrass & Hoffman, Portland, Oregon, for the defendants-appellees.

R. Broh Landsman, Helsell, Fetterman, Martin, Todd & Hokanson, Seattle, Washington, for the amicus Anti-Defamation League.

Marc D. Slonim, Ziontz, Chestnut, Varnell, Berley & Slonim, Seattle, Washington, for the amicus American Civil Liberties Union of Washington Foundation; William D. Hochberg, Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz, Seattle, Washington, for the amicus American Jewish Committee and Church Council of Greater Seattle.

Lowell V. Sturgill, Jr., United States Department of Justice, Washington, D.C., for the amicus United States of America.

OPINION

FARRIS, J., Circuit Judge:

FACTS

In the fall of 1984 several students at Lindbergh High School in Renton, Washington, sought permission from school officials to form a religious club. The students requested permission to meet on school grounds before school for prayer, Bible study and religious discussion. The school district permits a number of other student groups to meet on school grounds during noninstructional time, including such groups as the Pep Club, Chess Club and Ski Club. The school district denied the students' request, citing its view that such meetings would violate both the Washington state and federal Constitutions.

The students brought suit claiming that the district's refusal to let them meet on school grounds violated their statutory and constitutional rights to equal access. The students argued that the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988), requires Lindbergh to allow them to meet at school on the same basis as other noncurriculum related clubs. The students also argued that the Free Speech, Free Exercise, Free Association, Equal Protection and Due Process Clauses protect their right to meet on school grounds.

The Equal Access Act provides that

> [i]t shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to

> deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a). A "limited open forum" exists "whenever [a] school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." *Id.* at § 4071(b).

The district court held that the Equal Access Act does not apply to Lindbergh because the school did not have a "limited open forum". *Garnett v. Renton School District #403*, 675 F. Supp. 1268, 1274 (W.D. Wash. 1987). The court held that the Washington State constitution bars the school officials from permitting religious organizations to meet on school property. The district court rejected all of the students' constitutional claims. *Id.* at 1276.

We affirmed. 865 F.2d 1121, *modified*, 874 F.2d 608 (9th Cir. 1989). We held that allowing the students to meet at school would violate the Establishment Clause. The Supreme Court vacated our decision and remanded for reconsideration in light of its holding in *Board of Education v. Mergens*, 496 U.S. 226 (1990). *Garnett v. Renton School District*, 496 U.S. 914 (1990).[1] We remanded to the district court.

---

[1] Because our decision is controlled by the EAA, we do not reach the students' claim that their rights under the Free Speech and Free Exercise Clauses of the First Amendment were violated. We need not revisit our prior resolution of these issues in *Garnett v. Renton School Dist. No. 403*, 865 F.2d 1121, *modified*, 874

The district court concluded that by allowing several "noncurriculum" related student groups to meet on school grounds, the school had created a limited open forum. The court held, however, that the Washington State constitution precludes the Act from requiring the use of school premises by a religious club. The court reasoned that the EAA does not preempt the Washington State constitution because the Act does not require actions that would abridge "constitutional" rights or violate the law. The students appeal the district court's decision on remand.

We Reverse.

DISCUSSION

This appeal involves questions of law which we review *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984).

Under the EAA, "if a public secondary school allows only one 'noncurriculum related student group' to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time." *Mergens*, 496 U.S. at 236. The district court concluded there were eleven noncurriculum related student groups at Lindbergh High School. The

---

F.2d 608 (9th Cir. 1989), because, that decision having been vacated by the Supreme Court, it "has no precedential authority whatsoever." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991). This decision entirely replaces it.

court therefore found that the school had a "limited open forum" under the EAA.

Nonetheless, the district court held that Lindbergh could not permit the students to meet because the Washington State constitution prohibits student religious meetings on school grounds. The court held that the EAA did not preempt the Washington State constitution.

The Supremacy Clause provides that if federal law conflicts with state law, federal law prevails:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article VI, section 2. The Supreme Court has explained that,

> [i]n the absence of explicit statutory language signaling an intent to preempt [state law], we infer such intent where . . . the state law at issue conflicts with federal law, either because it is impossible to comply with both . . . or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. . . .

[1] *Northwest Central Pipeline v. Kansas Corp. Com.*, 489 U.S. 493, 509 (1989). The EAA does not explicitly preempt state law. The district court held that because the Washington constitution does not conflict with the EAA, the court would not infer that Congress intended to preempt state law.

The district court held that sections 4071(d)(5) and (7) of the Act allow school officials to comply with state statutory and constitutional provisions. Sections 4071(d)(5) and (7) provide that "[n]othing in [the EAA] shall be construed to authorize the United States or any State or political subdivision thereof . . . (5) to sanction meetings that are otherwise unlawful; [or] . . . (7) to abridge the constitutional rights of any person." The district court held that religious group meetings were "otherwise unlawful" and unconstitutional within the meaning of sections 4071(d)(5) and (7), because such meetings violate the Washington constitution.

[2] The students argue that sections 4071(d)(5) and (7) do not allow state law to override the EAA's requirements. They argue that Congress intended section 4071(d)(5) merely to clarify that the Act does not require school districts to permit student meetings that would be illegal for reasons other than their religious nature. They argue that section 4071(d)(7) only clarifies Congress' intent that the Act not be construed to limit *federal* constitutional rights.

[3] The dispute over the applicability of the EAA thus turns on the meaning of §§ 4071(d)(5) and (7). We begin with the plain language. *Mergens*, 496 U.S. at 237. Section 4071(a), the central provision of the Act, prohibits "any public secondary school" which receives federal funding and which has a limited open forum from denying religious student groups equal access. Sections 4071(d)(5) and (7) are designated as rules of construction, not exceptions to the Act. As such, they instruct the court how to interpret the Act's central command that schools not discriminate against religious speech.

[4] While section 4071(a) prohibits discrimination against a group on account of the religious character of its speech, it does not protect speech that is "otherwise unlawful" (section 4071(d)(5)). The school board's contention that section 4071(d)(5) permits states to bar meetings on campus because of their religious content renders the term "otherwise" meaningless. "Otherwise" refers to the protection afforded religious speech by section 4071(a). Thus, the phrase "otherwise unlawful" in section 4071(d)(5) is most logically understood as authorizing schools to bar meetings that are unlawful for reasons *other* than their religious content.

[5] We must read section 4071(d)(7) in the context of the entire Act. The provisions of sections 4071(c) and (d) are almost uniformly concerned with preventing an unconstitutional application of the Act. *See* section 4071(c)(1) (requiring that any religious meetings be voluntary); sections 4071(c)(1), (3) and (5) (prohibiting schools from participating in or sponsoring religious meetings); sections 4071(d)(1), (2), and (4) (prohibiting schools from influencing the content of prayer, requiring prayer, or forcing school personnel to attend meetings); section 4071(d)(3) (barring the use of public funds for religion beyond the incidental cost of providing space for meetings). None of these provisions purport to allow exceptions to the Act. Rather, they explicitly exclude from the Act's protection "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1970) (*quoting Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)). Congress hardly

inserted a sweeping exception to the Act within its perimeters. Section 4071(d)(7) is a "savings" clause that protects against reading implications into the EAA which might abridge federal constitutional rights, either for persons and schools within its scope, or for those outside its scope, such as secondary school teachers and elementary school students.

[6] The Supreme Court confronted a similar task of statutory interpretation in *Mergens*. *See* 496 U.S. at 237. The plaintiffs requested permission from school officials to form a Christian club at Westside High School. Westside denied the request and the students brought suit, claiming that the denial violated their rights under the EAA and the United States Constitution. The school board claimed that it did not have a limited open forum because all of its clubs were curriculum related. *See id.* at 232-33.

[7] The Supreme Court looked to the legislative purpose of the Act to determine the meaning of "noncurriculum related". The Court found that the Act reflected "at least some consensus on a broad legislative purpose." *Id.* at 239. The Court noted that Congress "intended [the Act] to address perceived widespread discrimination against religious speech in public schools," and that "its sponsors contemplated that the Act would do more than merely validate the status quo." *Id.* The Court held that "[a] broad reading of the Act would be consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion before and after classes." *Id.*

The school board argues that *Mergens* does not control our interpretation of sections 4071(d)(5) and (7) because the decision only determined the meaning of "noncurriculum related". The Court did more than that. It determined that the entire Act must be read to effectuate a broad Congressional purpose.

The Court rejected a narrow interpretation of "noncurriculum related clubs" because it would have resulted either in almost no schools being subject to the Act, or it would have permitted schools to strategically evade the Act. *Id.* at 244. Similarly, the school board's interpretation of 4071(d)(5) and (7) would likely exempt from the Act many schools in the Ninth Circuit and in the country. The EAA would apply only in states that did not have laws that prohibited religious student groups from meeting on school grounds. Many states have establishment clauses that are more restrictive than the federal establishment clause. *See* Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 Va. L. Rev. 625, 632-33 (1985). These state constitutional provisions might bar religious meetings on school grounds. States that are currently subject to the Act could "evade the Act" by enacting laws or interpreting their state constitutions to prohibit religious meetings on school grounds. Under the school board's interpretation of "otherwise unlawful", a school could prohibit religious speech on the basis of any legal prohibition, not just state law. Thus, cities and other political subdivisions of the state could circumvent the Act as well. The Court rejected similar results in *Mergens*. 496 U.S. at 244.

[8] The Court's finding of a broad legislative purpose suggests that Congress intended to preempt state

law: "Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it opens its facilities to noncurriculum related student groups." *Mergens*, 496 U.S. at 241. The Act permits schools to avoid its obligations, but only at a price. They must either reject federal funding or close the school's limited open forum. *See id.* If the EAA did not preempt state law, than states could freely opt out of its requirements. Congress did not intend to permit the states to thwart its objectives by outlawing speech based on its religious content, and thereby discriminate on that basis.

Both the students and the school district rely on the Act's legislative history to support their interpretation. We have reviewed the legislative history of the EAA and agree with the Supreme Court that it is "less than helpful". 496 U.S. at 238. The bill that led to the Act went through a series of revisions. During the negotiations that led to the Act's passage, many of the legislators changed positions. Thus the statements of individual Senators do not necessarily reflect Congressional purpose. *Id.; see also* Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 37-39 (1986).

CONCLUSION

State constitutions can be more protective of individual rights than the federal Constitution. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). However, states cannot abridge rights granted by federal

law. *Northwest Central Pipeline*, 489 U.S. at 509. Regardless of whether we agree with the Congressional balancing of state sovereignty and federal concerns, "[o]ur task is to apply the text, not to improve on it." *Mergens*, 496 U.S. at 241 (citations omitted). The EAA provides religious student groups a federal right. State law must therefore yield.

[9] The students have a right under the EAA to meet on school property on the same basis as other noncurriculum related clubs. Because our decision is controlled by the EAA, we need not reach the students' federal constitutional claims.

Reversed.

Each side shall bear its own costs.

FARRIS, J., Circuit Judge, Concurring:

Judge McGovern concluded that the Washington State constitution bars religious student groups from meeting on public high school campuses. I agree. I join the majority only because I am equally convinced that Congress intended to preempt state law. Congress has decided that the right of individual student groups to meet on campus outweighs the right of the citizens of Washington to maintain strict separation between church and state. The Supreme Court has held that the Establishment Clause does not afford protection against this exercise of Congressional power. *See Board of Education v. Mergens*, 496 U.S. 226, 253 (1989).

The result is no minor intrusion on state sovereignty. Nonetheless, I write to emphasize that Washington State

still retains a modicum of control over its public school system. Although the state may not be in a position to reject federal funding, it can close its limited open forum by restructuring its course offerings and existing student groups. *See id.* at 241.

I am satisfied that Judge McGovern properly concluded that the Washington State constitution prohibits the relief requested by the students. Article I, section 11 provides:

> No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

Article IX, section 4 forbids any sectarian influence in the public schools:

> All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

The use of public school property for religious club meetings violates Article I, section 11. In *Perry v. School District No. 81,* 54 Wash.2d 886, 344 P.2d 1036 (1959), the Washington Supreme Court held that a program permitting students to be released for religious study off school premises violated the state constitution. The school announced the program on school bulletin boards and distributed cards on which students could express interest in participating in the program. The court held that even this minimal appropriation of school facilities and personnel to distribute the cards constituted an impermissible "use of school facilities supported by public

funds for the promotion of a religious program." *Id.* at 896.

The Lindbergh High School religious club requests a much more substantial use of school facilities and funds than that allocated in *Perry*. The *Mergens* Court held that the EAA requires schools to permit student religious groups to meet on the same terms as other student groups that are part of the limited open forum. 496 U.S. at 247. Therefore, Lindbergh must allow the student religious group "access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair," *id.*, if the school permits other student groups to do the same. The school would need to assign a teacher to each meeting of the student religious club for custodial purposes. The Washington Supreme Court flatly rejected a more minimal use of school facilities and personnel in *Perry*. Moreover, the Washington Supreme Court cited with approval the district court's interpretation of the Washington Constitution in *Garnett I. Witters v. Comm'n for the Blind*, 112 Wash.2d 363, 771 P.2d 1119, 1122 n.11, *cert. denied*, 493 U.S. 850 (1989).

The Washington Supreme Court held in *Weiss v. Bruno*, 82 Wash.2d 199, 211, 509 P.2d 973, that "Const. art. 9, 4 does not provide that a minimal amount of sectarian control or influence is permissible." Religious student groups will exert powerful influences upon high school students. Congress apparently fails to recognize that certain "religious" groups may divert public schools from their basic educational mission. *See* Lorraine Pecarsky, *Coping: The Cult Phenomenon*, Washington Post, July 22, 1981, B5. A democratic society need not fear an open forum, but there is a sound basis for the barrier erected

by Article IX, section 4 of the Washington State Constitution. It does not bar an open exchange of ideas. It merely restricts "religious" groups from meeting on school grounds. The EAA overrides that bar.

The state may restructure its curriculum to avoid the obligations of the Act. *See Mergens,* 496 U.S. at 241. But there was a time when it would not have been required to do so as the price for enforcing its state constitution and obtaining critical federal funds.

As the district court correctly noted, state constitutions can be more protective of individual rights than the federal Constitution. *See, e.g., Pruneyard Shopping Center v. Robbins,* 447 U.S. 74, 81 (1980). For today, Congress has made it more difficult, but not impossible, for a state to maintain a sturdier wall between church and state than the barrier recognized by the Supreme Court. The Establishment Clause has not yet been relegated to history. "But the signs are evident and very ominous, and a chill wind blows." *Webster v. Reproductive Services,* 492 U.S. 560 (1988) (Blackmun, J., concurring in part and dissenting in part).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD GARNETT, by and through his next friend, Peggy Smith; SCOTT GERMINO; ROBERT RYAN, by and through his next friend, Jack Ryan; RICHARD TRACY, by and through his next friend, Michael Tracy; STEPHEN M. HANNING, a minor, by Mr. and Mrs. Bruce Sharp, his Guardians Ad Litem; TANYA M. HANNING, a minor, by Mr. and Mrs. Bruce Sharp, her Guardians Ad Litem; ROBERT M. MAYER, a minor, by Mr. and Mrs. Michael L. Mayer, his Guardians Ad Litem; JAIME R. MAYER, a minor, by Mr. and Mrs. Michael L. Mayer, her Guardians Ad Litem, Plaintiffs-Appellants, v. RENTON SCHOOL DISTRICT NO. 403; ROBERT N. ANDERSON, in his official capacity; BRIAN BAKER, in his official capacity; JOHN G. DUBOIS, in his official capacity; MARCIA K. HOLLAND, in her official capacity; DONALD JACOBSON, in his official capacity; GARY F. KOHLWES, in his official capacity; MARGARITA PRENTICE, in her official capacity, Defendants-Appellees.	(Filed Apr. 27, 1993) CATHY A CATTERSON, CLERK U.S. COURT OF APPEALS C.A. NO. 91-36036 D.C. NO. C87-1294M (Western Washington) ORDER

Before: WRIGHT, FARRIS, and KLEINFELD, Circuit Judges.

The panel has voted to deny appellees' petition for rehearing. Judges Farris and Kleinfeld have voted to reject the suggestion for rehearing en banc and Judge Wright recommends rejection.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appellees' motion for a stay of mandate pending application for certiorari is granted. The mandate is stayed for 30 days from the date of this order.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD GARNETT, et al. Plaintiffs, v. RENTON SCHOOL DISTRICT, et al. Defendants.	)	No. C87-1294M ORDER ON REMAND

I. INTRODUCTION.

The United States Supreme Court reversed the Ninth Circuit's affirmation of this Court's order that concluded Defendants had not created a limited open forum, and that even if it had, the Equal Access Act by its own terms cannot operate to require activity prohibited under the Washington constitution. On remand, the Ninth Circuit received additional briefs then remanded the matter to the District Court for resolution of the issues raised.

A review of the student groups now present at Lindbergh High School reveals that noncurriculum-related student groups meet or have an opportunity to meet on the school's premises, creating a "limited open forum" under the Equal Access Act. The Washington constitution, however, precludes the Act from requiring the use of school premises by a religious club. The Supremacy Clause of the United States Constitution does not bar the Washington constitution from limiting application of the Act. The Act itself provides that it does not operate to require activity that would abridge constitutional rights.

II. REVIEW OF STUDENT GROUPS.

The Court has reviewed the parties' briefs concerning whether the Equal Access Act (EAA) was triggered in September 1987 and presently remains applicable to Lindbergh High School. The parties have agreed that four student groups are noncurriculum related (Pep Club, Chess Club, Girls' Club, and Ski Club) and four student groups are curriculum related (DECA: Distributive Education Club of America, DOCA: Diversified Occupation Club of America, VICA: Vocational Industrial Club of America, LIMITS: Computer Club); they disagree as to the proper designation of seven student groups (Bowling Club, SKY Club, International Club, Varsity Club, Minority Student Union, Dance Squad, FBLA: Future Business Leaders of America).

Each of the seven student groups on which the parties disagree will be reviewed under the criteria for evaluating student groups set forth in *Board of Education of Westside Community Schools v. Mergens*, 495 U.S. ___, 110 S. Ct. 2356, 110 L. Ed.24 191 (1990). *Mergens* set forth the criteria as follows:

> In light of this legislative purpose, we think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school. In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required

for a particular course; or if participation in the group results in academic credit.

Applying this criteria to the disputed student groups, the Court concludes as follows:

1. *Bowling Club.* Bowling is not taught in a regularly offered course. While Bowling Club members may participate in intermural tournaments with other public high schools, this fact is irrelevant in applying the *Mergens* test.

The Bowling Club is a noncurriculum related student group.

2. *SKY (Special Kiwanis Youth) Club.* SKY Club's purpose is to help people in need. As part of the Academic Challenge Program (a more rigorous academic program), participating students must satisfy certain academic and competency requirements and complete two community service projects. SKY Club, as well as the ACLU, churches, political parties, and Greenpeace, etc., are listed on the Volunteer Service Project Source List to assist students in completing the community service requirement. A "Certificate of Achievement" is awarded upon students satisfactorily completing the Program.

The Program serves to enrich and broaden students' education. A Certificate of Achievement for completion of the entire program is not the same as academic credit for course work components. Students are not required to participate in SKY Club in connection with a class. Handicaps and disabilities are not the subject matter of any regularly offered course at Lindbergh High School, and the club advisor (who is not paid for this duty) does not

prepare lessons or educate on this subject, but sometimes leads discussions.

The Program brings academic course work together with community service projects. The community service element is not sufficiently related by virtue of being part of a particular program to qualify it as curriculum related under *Mergens*.

SKY Club is a noncurriculum related student group.

3. *International Club.* This club provides a means for the exchange of ideas and information about the cultures of exchange students from different countries. While all the foreign language teachers participate in the Club and urge their students to participate also, and while a goal shared by the Club and the study of a foreign language is cultural understanding, these facts are insufficient for curriculum relatedness. The exchange of personal cultural experiences among students in the Club is not a subject that is actually taught and for which credit is received. Foreign languages are taught, but International Club activities are not woven into the actual course work as a required element for foreign language credit.

International Club is a noncurriculum related student group.

4. *Varsity (formerly Lettermen's) Club.* Varsity Club is inactive; it did not meet during the 1987-88 school year and met twice last year. This Club remains on the School District's Master List, which means it is authorized to meet without further Board Action; thus, an opportunity for Varsity Club to meet is provided. Varsity Club does not have a constitution, but its faculty advisor said its

purpose is to provide public service to the school and surrounding community through beautification projects, parking assistance, outside ministry to rest homes, and services to the needy. No course requires participation in Varsity Club, nor is academic credit conferred for participation.

As constituted in the past, Varsity Club is a noncurriculum related student group.

5. *Minority Student Union.* The MSU discusses cultural activities, human relations skills, SAT testing information, and offers the student body a black history program in February. The MSU "enhances some things taught in the social studies program."

The subject matter of the MSU is not taught in a regularly offered course, and participation in MSU is not required for any course.

The Minority Student Union is a noncurriculum related student group.

6. *Dance Squad.* The Squad's constitution states that its purpose is to promote school spirit and to provide extracurricular activity at athletic and social functions. Participation is not required for any course, nor is credit conferred for participation. Students may, however, petition to substitute Dance Squad participation for one of their physical education credits. It is not stated what criteria are used to determine whether a student's petition will result in a P.E. credit being conferred.

Dance Squad's curriculum relationship as presently constituted is too tenuous to meet the *Mergens* test. Moreover, allowing for petitions to receive academic credit for

a student group could provide a convenient pretext to avoid triggering the Equal Access Act. The *Mergens* criteria require a consideration of substance and not just appearance.

The Dance Squad is a noncurriculum related student group.

7. *FBLA (Future Business Leaders of America).* District and State guidelines require Lindbergh High to offer FBLA or a similar program to students enrolled in business classes. Business class students are not required to participate in FBLA but are encouraged to do so by their teachers. No academic credit is given for FBLA participation. The faculty advisor generally does not instruct members or plan club meetings or activities.

The FBLA does not meet the *Mergens* standard. Where such an activity as the FBLA is required to be offered, a school desiring to avoid creating a limited open forum would have to adjust class requirements, provide instruction in FBLA meetings, or drop business classes. These problems are irrelevant in assessing the substantive curriculum relatedness of a student group under *Mergens*.

The FBLA is a noncurriculum related student group.

There are, therefore, eleven noncurriculum related student groups at Lindbergh High School. The presence of such groups, or of the opportunity of such groups to meet, results in the creation of a "limited open forum" under the Equal Access Act. 20 U.S.C. 4071.

The remaining issues to be addressed are (1) whether Congress intended to preempt contrary state and local

law and, if not, (2) whether the Washington state constitution prevents the enforcement of the Equal Access Act at public schools within the State of Washington.

III. EFFECT OF TRIGGERING EQUAL ACCESS ACT.

1. The Washington Constitution.

While the presence of noncurriculum related student groups meeting on Lindbergh High premises creates a "limited open forum," nevertheless, the Washington constitution prevents application of the Equal Access Act (EAA) to allow a religious meeting on any public high school premises in Washington.

The Court's conclusion in the Order Denying Plaintiff's Motion for Preliminary Injunction is adopted herein as follows.

The EAA seeks to provide a constitutional means for public schools to allow religious as well as secular groups to use school premises, so long as there is no school sponsorship of a religious group initiated by students. The question then becomes whether the neutral operation of a law that would bring religious clubs onto school premises – albeit without school sponsorship or teacher supervision or assistance – would appear to create an impermissible atmosphere of religious partisanship.

The answer in Washington State is yes. The mandatory provisions of the EAA may not be applied in Washington State to permit religious organizations to meet on school premises owing to provisions of this state's constitution and relevant case law construing their application.

The Washington constitution "requires a far stricter separation of church and state than the federal constitution. . . . " *Witters v. Commission for the Blind*, 102 Wn.2d 624, 626, 689 P.2d 53 (1984), *rev'd sub nom on other grounds, Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986). Two provisions of the state constitution prohibit the relief requested here. Article I, section 2 denies religious groups any use of public money or property:

> No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

Article IX, section 4 expressly forbids any sectarian influence in the public schools:

> All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

Plaintiffs' requested relief is prohibited because it would (1) tend to introduce sectarian influence into Lindbergh High School and (2) result in an impermissible appropriation of public money or property for religious worship or exercise. First, the prohibition of sectarian influence or control is absolute under Article IX, section 4:

> While the establishment clause broadly condemns any law "respecting an establishment of religion," our constitution specifically demands that no public funds be used to maintain or support any school which is under sectarian control or influence. *There is no such thing as a 'de minimis' violation* of Article 9, section 4. Nor is a

> violation of this provision determined by means of a balancing process. The words of Article 9, section 4 mean precisely what they say: *the prohibition is absolute.*

(Citations omitted, emphasis supplied.) *Weiss v. Bruno*, 82 Wn.2d 199, 206, 509 P.2d 973 (1973). *Weiss* concerned state tuition assistance whereby the student recipient could choose to attend schools with or without religious sponsorship. Because a portion of the grant funds went to students attending parochial school, the Washington Supreme Court held the program unconstitutional, stating:

> Any use of public funds that benefits schools under sectarian control or influence – regardless of whether that benefit is characterized as "indirect" or "incidental" – violates this provision.

82 Wn.2d at 211. The Court further held:

> Const. art. 9, 4 does not provide that a minimal amount of sectarian control or influence is permissible. We cannot say that any of these schools is completely free from such influence.

82 Wn.2d at 228. The Anti-Defamation League of B'nai B'rith (ADL) argues, and the Court agrees, that if Bible study groups are allowed to meet on school premises during the school day, Lindbergh High School will no longer be *completely free* from sectarian influence:

> Plaintiffs, who by filing this suit have demonstrated drive, initiative and deep religious feelings, undoubtedly will have substantial influence within the school. Article IX section 4 prohibits all sectarian influence in the public schools, no matter how slight. The considerable

> influence that plaintiffs' religious group is likely to have in Lindbergh High School is not permitted by the state constitution.

ADL Memorandum at 7. The proscription of "influence" as well as "control" by sectarian elements was a conscious decision:

> It is indisputable that this more restrictive clause was the deliberate design of the framers of our constitution. The statehood compact with the United States required that provision be made for a public school system free from sectarian *control*. . . . Obviously not satisfied with the broader concept of control, the authors of our constitution added the words "or influence." A motion to strike those words failed.

(Emphasis in original, citations omitted.) 82 Wn. 2d at 206.

Second, the ban on the use of public funds and property for religious purposes is – like the ban of influence and control by sectarian elements – absolute and without exception. The use of a public school's property for the purposes of religious club meetings is a patent violation of Article IX, section 4 of the Washington State Constitution. That there is also no de minimis appropriation of money or property for a religious purpose is demonstrated by *Perry v. School District No. 81*, 54 Wn.2d 886, 344 P.2d 1036 (1959). There, a program permitting students to be released from school for religious study off school premises was held unconstitutional because (1) the program was announced on school bulletin boards and (2) the school distributed cards on which students could express interest in participating in the program. This use

of school facilities and personnel to distribute the cards constituted an impermissible "use of school facilities supported by public funds for the promotion of a religious program." *Id.* at 896.

Similarly, a program permitting public school students to receive academic credit for religious study outside the school system was declared unconstitutional in *State Ex. Rel. Dearle v. Frazier,* 102 Wash. 369, 173 P. 35 (1918) because the expenditure of time by public school teachers to determine the number of credits to give students for independent religious instruction would constitute an appropriation of funds for religious instruction in violation of Article I, section 2 no matter how small the expenditure of time by the teachers or how slight, indirect, or consequential the benefit to religion.

ADL reasons from the above cases and the Court agrees:

> Plaintiffs here ask for much more substantial public support than was held unconstitutional in *Perry* or in *Frazier.* Plaintiffs seek to hold their meetings on public school property, a direct and unambiguous "application of property" for religious worship or exercise. The use of school personnel to supervise religious clubs for compliance with the federal Equal Access Act and the use of bulletin boards or other common areas of the school to advertise religious club meetings are all uses of public personnel or public funds to support religion. Each is as substantial as the use of school facilities for announcements or the distribution of cards in *Perry* or the use of teacher time in *Frazier* to determine credit for outside religious study.

ADL Memorandum at 9. Finally, ADL contends that a bright line demarcation of church and state, as provided in Washington's constitution, is the surest approach to maintaining separation of these entities; there can be no tolerance for sectarian influence no matter how slight.

The conclusion is unavoidable that if Plaintiffs were to obtain their requested relief, the meetings of their religious club on school premises would amount to at least a slight benefit to religion, a benefit that is prohibited by Washington's constitution.

The EAA does not require the Renton School District to permit an unconstitutional use of school property. The EAA by its own terms does not force Renton School District No. 403 and Lindbergh High School *"to sanction meetings that are otherwise unlawful; . . .* or to abridge the constitutional rights of any person." 20 U.S.C. 4071(d)(5), (7). Under Washington's constitution, meetings of religious groups on school premises would be unconstitutional because such meetings would introduce sectarian influences into the school and because they would result in an impermissible appropriation of public money or property for a religious purpose.

2. Preemption.

The Supremacy Clause of the Federal Constitution does not bar the Washington constitution from limiting application of the Equal Access Act. The Supreme Court has consistently held that state courts may interpret state constitutions to be more protective of individual rights than the Federal Constitution. *See, e.g., Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 81 (1980). In *Northwest*

Pipeline v. Kan. Corp. Com., 489 U.S. 493, 103 L. Ed. 2d 509 (1989), the Court stated:

> Congress has the power under the Supremacy Clause of Article VI of the Constitution to preempt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law . . . or where the state law at issue conflicts with federal law, either because it is impossible to comply with both . . . or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. . . .

103 L. Ed. 2d at 526-27. The Act contains no clear expression of congressional intent to preempt state law. The statute only refers to superseding inconsistent federal law. 20 U.S.C. 4074. The plain language of the Act is clear that Congress did not legislate so comprehensively as to occupy an entire field of regulation:

> Nothing in this [Act] shall be construed to authorize the United States or any State or political subdivision thereof – . . .
>
> (5) to sanction meetings that are otherwise unlawful; [or] . . .
>
> (7) to abridge the constitutional rights of any person.

20 U.S.C. 4071(d). This Court concluded that under these provisions it would be unlawful and unconstitutional for Defendants to permit Plaintiffs' religious club to meet on

LHS premises. These provisions cannot be interpreted as only a means to allow schools to maintain order and discipline, as this is separately provided. Section 4071(f) provides that nothing in the Act

> shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

Section 4071(c)(4) adds that a school need not allow meetings that "materially and substantially interfere with the orderly conduct of educational activities within the school." Congress' explicit reference to the "constitutional rights of any person" cannot reasonably be limited to a school's interest in maintaining order and discipline.

Congress was surely aware of provisions in the Washington constitution that mandate absolute separation of government and religion. Senator Slade Gorton specifically referred to Washington's constitutional provision in commenting upon a proposed Constitutional amendment prior to the Congress enacting the Equal Access Act. (*See* 130 Cong. Rec. S2883 (Daily ed. March 20, 1984)). State constitutional provisions were not preempted by virtue of 4071(d)(5) and (7).

Moreover, in the Enabling Act allowing creation of the State of Washington, Congress commanded that the Washington Constitution contain the following:

> [P]rovision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all children of said State, and free from sectarian control.

Act of Feb. 22, 1889, ch. 180, 4, 25 Stat. 676. The Washington constitution incorporates that language with the additional words "or influence" after "sectarian control."

Legislative history makes it clear that Congress simply wanted to provide that if a public secondary school permits student groups to meet for student-initiated activity not related to the curriculum, the school must allow other groups to meet to discuss religious, political, philosophical or other issues. The Act, however, is entirely devoid of *any* manifestation of intent to require schools to violate statutory or constitutional provisions. Indeed, the Act explicitly allows local authorities to comply with state statutory and constitutional provisions. There is no intent to displace the Washington constitution.

IV. CONCLUSION.

In summary, noncurriculum related groups are present at Lindbergh High School. The presence of such groups results in the creation of a "limited open forum" under the EAA. When a limited open forum is created, the Act requires that a school allow other noncurriculum related groups, including religious groups, to meet on school premises. The Act does not, however, comprehensively occupy the entire field and specifically refers to the continuing effectiveness of State laws and constitutional rights. There being no preemption, the Washington constitution precludes the use of school premises by a religious club.

DATED this 15th day of August, 1991.

/s/ Walter T. McGovern
WALTER T. McGOVERN
United States District Judge

APPENDIX D

EQUAL ACCESS ACT [20 U.S.C. §§ 4071-4074 (1984)]

§ 4071. Denial of equal access prohibited

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that –

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Construction of subchapter with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof –

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Federal financial assistance to schools unaffected

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order, discipline, well-being, and attendance concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

§ 4072. Definitions

As used in this subchapter –

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual

classroom instruction begins or after actual classroom instruction ends.

§ 4073. Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

§ 4074. Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

WASHINGTON CONSTITUTION

ARTICLE I

§ 11. Religious Freedom

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: . . . No religious qualification shall be required for

any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

ARTICLE IX

§ 4. Sectarian Control or Influence Prohibited

All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

UNITED STATES CONSTITUTION

ARTICLE VI

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Supreme Court, U.S.
FILED
JUN 10 1993
OFFICE OF THE CLERK

No. 92-1890

In The

Supreme Court of the United States

October Term, 1992

RENTON SCHOOL DISTRICT, NO. 403, *et al.*,

Petitioners,

v.

RICHARD GARNETT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STEVEN T. MCFARLAND*
Center for Law & Religious Freedom
Christian Legal Society
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
(703) 642-1070

MICHAEL W. MCCONNELL
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, IL 60603
(312) 702-3306

WILLIAM H. ELLIS, JR.
Western Center for Law & Religious Freedom
999 Third Avenue, Suite 3700
Seattle, WA 98104
(206) 682-0565

*Counsel of Record

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

QUESTION PRESENTED

Whether the Equal Access Act, 20 U.S.C. §§ 4071-4074, preempts arguably inconsistent state constitutional law.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 1

I. The Decision Below Is Plainly Correct And Does Not Conflict With The Decision Of Any Other Court 3

II. Petitioners' Claim That The Decision Below Violates State Constitutional Principles Does Not Raise An Issue Meriting Review 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Alverado v. Washington Public Power Supply, 111 Wash. 2d 424, 759 P.2d 427 (1988) (*en banc*) 8

Garnett v. Renton School Dist. No. 403, 496 U.S. 914 (1990) 4

Garnett v. Renton School Dist. No. 403, 865 F.2d 1121, *modified*, 874 F.2d 608 (9th Cir. 1989) 4

Schlacter-Jones v. General Telephone, 936 F.2d 435 (9th Cir. 1991) 8

Utility Workers of America v. Southern California Edison, 852 F.2d 1083 (9th Cir. 1988) 8

Warner Cable Communications v. City of Niceville, 911 F.2d 634 (11th Cir. 1990) 8

Weiss v. Bruno, 82 Wash. 2d 199, 509 P.2d 973 (1973) 9

Westside Community Board of Education v. Mergens, 496 U.S. 226 (1990) ..... *passim*

Widmar v. Vincent, 454 U.S. 263 (1981) 7

Writers' Guild v. Superior Court, 53 Cal. App. 3d 468, 126 Cal. Rptr. 498 (2d Dist. 1975) 8

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. VI, cl. 2 2

U.S. Const. amend. I 6

20 U.S.C. §§ 4071-4074 (1984) ..... *passim*

OTHER AUTHORITY

Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 Va. L. Rev. 625 (1985) 6

No. 92-1890

In The

Supreme Court of the United States

October Term, 1992

RENTON SCHOOL DISTRICT, NO. 403, *et al.*,

Petitioners,

v.

RICHARD GARNETT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents accept the statement of the case in the Petition.

REASONS FOR DENYING THE PETITION

This case satisfies none of the traditional criteria for *certiorari*. In its present posture, it is nothing more than a dispute over the meaning of a federal statute, the Equal Access Act, 20 U.S.C. § 4071-74. Petitioners contend that two relatively minor subsections of the Act, subsections 4071(d)(5) and (d)(7), constitute a total exemption from

the Act for every school within the State of Washington and "many" other states (those states with Establishment Clauses said to be "stricter" than that of the First Amendment). See Pet. 7. The court of appeals unanimously and sensibly rejected that argument. The decision below does not conflict with the decision of any other court, and tracks closely the analysis laid down by this Court in *Westside Community Board of Education v. Mergens*, 496 U.S. 226 (1990). It is, moveover, a straightforward interpretation of the plain language of the Act, amply supported by its purpose and legislative history.

The theory of the Petition is that this case warrants review because a federal statute was held to preempt arguably inconsistent state constitutional provisions. But there is nothing unusual in that. By its terms, the Supremacy Clause provides that federal law shall be "the supreme Law of the Land, . . . any Thing in the *Constitution or Laws of any State* to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2 (emphasis added). But even if federal statutory preemption of state constitutional law did somehow raise a significant issue, there still would be no reason to grant certiorari in this case. The supposed conflict between the Equal Access Act and the Washington State Constitution is entirely speculative: neither the state courts nor the court below have concluded that the state constitution bars voluntary, student-initiated extracurricular club meetings on the premises of a public high school. It will be time enough for this Court to consider the question presented if and when an unreversed court concludes that the state constitution forbids what the Equal Access Act requires. Such an issue should not be decided on the basis of a hypothetical conflict.

I. The Decision Below Is Plainly Correct And Does Not Conflict With The Decision Of Any Other Court

The Equal Access Act applies to "any public secondary school which receives Federal financial assistance and which has a limited open forum." 20 U.S.C. § 4071(a). It is undisputed that Lindbergh High School is a public secondary school, that it receives federal financial assistance, and that it has a limited open forum. Pet. 3. The Act therefore applies to Lindbergh High School – unless another provision of the Act creates an exemption.[1]

Petitioners' argument for exemption rests on two subsections of the Act:

> Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof –
>
> . . .
>
> (5) to sanction meetings that are otherwise unlawful; [or]
>
> . . .
>
> (7) to abridge the constitutional rights of any person.

20 U.S.C. § 4071(d)(5), (d)(7). Petitioners contend that these subsections exempt Lindbergh High School from the Act because, under the Washington Constitution,

---

[1] Petitioners' repeated statement that the question here is whether the Act "*implicitly*" preempts state law (Pet. i, 7, 8 (emphasis in original)) is incorrect. This is a case of express preemption. The only issue is whether subsections 4071(d)(5) and (d)(7) create an exemption from the otherwise clear requirements of the Act.

allowing student religious meetings would be "unlawful" and "unconstitutional."

The Ninth Circuit unanimously rejected petitioners' argument. Pet. App. A9-A13. Even Judge Farris, who wrote a separate concurrence passionately criticizing what he considers to be the Act's "intrusion on state sovereignty" (Pet. App. A14),[2] was forced to conclude that "Congress intended to preempt state law." *Id.* Not a single judge in the Ninth Circuit voted for rehearing or rehearing *en banc*. See Pet. App. B1-B2. No other court has reached a contrary conclusion. In the absence of any conflict or dissent, there is absolutely no reason for this Court to take the case.

The decision below is well founded. As the Ninth Circuit noted, subsections (d)(5) and (d)(7) "are designated as rules of construction, not exceptions to the Act." Pet. App. A9. "As such," the panel explained, "they instruct the court *how* to interpret the Act's central command that schools not discriminate against religious speech." *Id.* (emphasis added). They do address *whether* schools are required to comply, as petitioners assert. The core provision of the Act, section 4071(a), plainly states that *all* public secondary schools receiving federal financial assistance and maintaining a limited open forum must comply. It would be nonsensical to interpret rules of

---

[2] Judge Farris also had authored the opinion rejecting the students' claims in an earlier stage of this litigation. *Garnett v. Renton School Dist. No. 403 (Garnett I)*, 865 F.2d 1121, *modified*, 874 F.2d 608 (9th Cir. 1989). That decision was vacated by this Court and remanded for reconsideration in light of *Mergens*. *Garnett v. Renton School District*, 496 U.S. 914 (1990).

"construction" as authorizing states to do precisely what the Act otherwise prohibits them from doing.

Moreover, petitioners' interpretation of subsection (d)(5) conflicts with its plain language. Section 4071(a) prohibits covered schools from discriminating against student groups "on the basis of the religious, political, philosophical, or other content of the speech at [their] meetings," and subsection (d)(5) clarifies that the schools are not required to sanction meetings that are "otherwise" unlawful – that is, unlawful for reasons *other than* the religious, political, philosophical, or other content of their speech. To treat speech as "unlawful" *because* it is religious would "render[] the term 'otherwise' meaningless," as the court below noted. Pet. App. A10.

The meaning of subsection (d)(7) is less transparent on its face, but no less clear in context. As the court of appeals held, it refers to *federal* constitutional rights. The court of appeals gave three reasons for this conclusion. First, subsection (d)(7) is a typical "savings clause" (Pet. App. A11) – not a gaping loophole. Its purpose is to ensure that the Act is not interpreted in a way that would render it *unconstitutional*. Conflict with a state constitution would not render the Act "unconstitutional," since federal statutes supersede inconsistent state law under the Supremacy Clause.[3] Second, the court concluded that

---

[3] The legislative history of the Act is replete with discussions of "constitutional rights" – every one of them a reference to *federal* constitutional rights. There is not a single reference to state constitutional rights in the entire course of legislative consideration. The statement made by Senator Gorton, quoted by petitioners at Pet. 13 n.7, was in reference to versions of a

the principles of statutory construction applied by this Court in *Mergens* required rejection of petitioners' interpretation. *Id*, at A11-A12. In *Mergens*, this Court stated that the Act should be interpreted in accordance with its "broad legislative purpose" to "address perceived widespread discrimination against religious speech in public schools," and to "do more than merely validate the status quo." 469 U.S. at 239. To adopt petitioners' construction, by contrast, "would likely exempt from the Act many schools in the Ninth Circuit and in the country" (Pet. App. A12) and allow states to "evade the Act" (*id.*) by adopting convenient interpretations of their state constitutions.[4] Third, the court concluded that Congress intended to preempt state law. Pet. App. A12-A13. The protection of free speech rights is logically a matter of nationwide concern. "The Act permits schools to avoid its obligations," the court noted, "but only at a price. They must either reject federal funding or close the school's limited open forum." *Id*. at A13. It is not consistent with

---

proposed constitutional amendment to permit school prayer. It had no application to the Equal Access Act, which was not debated until three months later. Indeed, since the proposals Senator Gorton discussed were permissive in nature (unlike the Equal Access Act), the Senator's point does not apply even by analogy.

[4] About half the states have establishment clauses stricter than the First Amendment. *See* Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 Va. L. Rev. 625 (1985). Even in the others, the state courts would be entitled to interpret state constitutional language as precluding equal access. This would render the Equal Access Act optional, at the discretion of the state courts.

the congressional purpose to allow states to "freely opt out of its requirements." *Id.*

Most decisively, as even petitioners concede (Pet. 14), "[t]he congressional objective in enacting the Equal Access Act was to codify the equal access guarantees of *Widmar v. Vincent*, 454 U.S. 263 (1981), and to extend the holding of *Widmar* to public secondary schools." *See Mergens*, 469 U.S. at 235. It is highly significant, therefore, that the equal access right in *Widmar* was held to preempt a state constitutional claim essentially identical to the one petitioners make in this case. *See Widmar*, 454 U.S. at 276-77. An extension of *Widmar* to secondary schools would thus naturally be understood as overriding state constitutional objections.

In support of their contrary interpretation, petitioners have nothing to offer. Nothing in the language, history, or purpose of the Equal Access Act supports the proposition that it was intended not to apply to states whose courts interpret state constitutional provisions as disallowing equal access. If Congress had intended to carve out so broad an exception to the Act, one would expect to see some discussion of the matter during the course of deliberations. There was none.

The unanimous decision of the Ninth Circuit is thus almost surely correct on the merits. There is no justification for further review.

II. Petitioners' Claim That The Decision Below Violates State Constitutional Principles Does Not Raise An Issue Meriting Review

Petitioners maintain that this case warrants review because the Act has the effect of preempting state constitutional law. But there is nothing surprising or noteworthy about that. As the plain language of the Supremacy Clause makes clear, state constitutional law is susceptible to federal preemption no less than any other form of state law. *See, e.g., Schlacter-Jones v. General Telephone*, 936 F.2d 435 (9th Cir. 1991) (federal labor law preempts state constitutional rights of privacy); *Warner Cable Communications v. City of Niceville*, 911 F.2d 634, 643 (11th Cir. 1990) (federal Cable Act preempts state constitutional prohibition against delegation of legislative authority); *Utility Workers of America v. Southern California Edison*, 852 F.2d 1083 (9th Cir. 1988) (federal law preempts state constitutional protection against drug testing program). The Washington Supreme Court itself has recognized that "the constitutional principle of federal preemption precludes application of the state constitution" when the state constitution conflicts with a federal statute. *Alverado v. Washington Public Power Supply*, 111 Wash. 2d 424, 430, 799 P.2d 427 (1988) (*en banc*); *see also Writers' Guild v. Superior Court*, 53 Cal. App. 3d 468, 478, 126 Cal. Rptr. 498, 504 (2d Dist. 1975) ("A state constitutional provision is as much preempted by federal law as is a state statute if preemption applies."). Petitioners cite no authority, and we are aware of none, that questions the legitimacy of federal statutory preemption of state constitutional provisions.

But even assuming *arguendo* that the preemption of a state constitutional provision raises a certworthy issue, there is no reason for the Court to review *this* case. No Washington state court has held that allowing voluntary student religious clubs on public school property would violate the state constitution, and such an interpretation of the state constitution would be highly implausible.[5] Petitioners are thus asking this Court to answer an entirely hypothetical question. The only Washington case cited by petitioners (Pet. 12) involves state funding of religious activities, which obviously raises different issues. *Weiss v. Bruno*, 82 Wash. 2d 199 (1973) (use of state money for tuition at religious school).

There is no basis for petitioners' extraordinary claim that to allow individual high school students to exercise free speech rights on public property, without official preference or endorsement, would constitute unconstitutional "sectarian control or influence" over the public schools. This would suggest that students could not talk to one another about religion over lunch or in the hallways – or park a car with a "Jesus Saves" bumper sticker in the school parking lot. The Washington Constitution may be "stricter" than the federal Establishment Clause, but petitioners take the idea to the point of absurdity. Precedents from the Washington Supreme Court are fully consistent with the principle that the private speech of private persons does not violate the Establishment Clause – even if they are on public property.

---

[5] It is true that the district court so held in this case, but the judgment of the district court was reversed by the Ninth Circuit (which did not reach the state constitutional issue).

In any event, there is no need for this Court to take the case to resolve this purely hypothetical problem. If the courts of Washington or elsewhere should hold that allowing equal access violates the state constitution, it will be time enough for this Court to decide whether that raises a certworthy issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

STEVEN T. MCFARLAND*
Center for Law & Religious Freedom
Christian Legal Society
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
(703) 642-1070

MICHAEL W. MCCONNELL
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, IL 60603
(312) 702-3306

WILLIAM H. ELLIS, JR.
Western Center for Law & Religious Freedom
999 Third Avenue, Suite 3700
Seattle, WA 98104
(206) 682-0565

*Counsel of Record

Attorneys for Respondents

June 10, 1993

Supreme Court, U.S.
FILED
AUG 11 1993
OFFICE OF THE CLERK

No. 92-1890

In The

Supreme Court of the United States

October Term, 1993

RENTON SCHOOL DISTRICT NO. 403, *et al.*,

Petitioners,

v.

RICHARD GARNETT, by and through his next friend, Peggy Smith, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

I. FRANKLIN HUNSAKER, III*
SCOTT M. STICKNEY
BULLIVANT, HOUSER, BAILEY, PENDERGRASS & HOFFMAN
300 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204
(503) 228-6351

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

12 pp

TABLE OF CONTENTS

Page

1. The conflict between the Equal Access Act and the Washington Constitution presents an actual controversy and is not "speculative" nor is the question presented "hypothetical." 2

2. The Ninth Circuit did not base its decision on an express preemption of the Washington Constitution by the Equal Access Act but instead on an implied preemption 3

3. Petitioners' and the District Court's interpretation of the Washington Constitution is both plausible and correct 5

4. Contrary to Respondents' contention, there are no "free speech rights on public property" involved in this matter 6

Conclusion 8

TABLE OF AUTHORITIES

Page

Cases

Alverado v. Washington Public Power Supply, 111 Wash. 2d 424, 799 P.2d 427 (1988) 5

Board of Education v. Mergens, 496 U.S. 226 (1990) 7

Garnett v. Renton School District No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987) 8

Garnett v. Renton School Dist. No. 403, 987 F.2d 641 (9th Cir. 1993) 2, 3, 6, 7, 8

Northwest Pipeline v. Kan. Corp. Com., 489 U.S. 493 (1989) 4

Perry v. School District No. 81, 54 Wash. 2d 886, 344 P.2d 1036 (1959) 7

Witters v. Comm'n for the Blind, 112 Wash. 2d 363, 771 P.2d 1119, *cert. denied*, 493 U.S. 850 (1989) 3, 8

Constitutional and Statutory Provisions

U.S. Const. art. VI, cl. 2 (Supremacy Clause) 4

20 U.S.C. §§ 4071-4074 (1984) ("Equal Access Act") *passim*

Wash. Const. ..... *passim*

No. 92-1890

In The

Supreme Court of the United States

October Term, 1993

RENTON SCHOOL DISTRICT NO. 403, *et al.*,

Petitioners,

v.

RICHARD GARNETT, by and through his next friend, Peggy Smith, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

Respondents contend that this Court should deny certiorari because they assert that any conflict between the Equal Access Act and the Washington Constitution is "entirely speculative" (Resp. Br. 2) and the question presented by the Petition for Writ of Certiorari is "purely hypothetical" (*id.* at 9-10). As demonstrated in the Petition for Writ of Certiorari, and as will be discussed below, Respondents simply are wrong.

As Judge Farris correctly acknowledged in his Concurring Opinion,[1] and contrary to Respondents' erroneous contention, Petitioners' (and the District Court's) interpretation of the Washington Constitution is neither "highly implausible" nor "absurd." (Resp. Br. 9) The question of whether the Equal Access Act *implicitly* preempts the Washington Constitution is exceptionally important and one of first impression that should be resolved by this Court.

1. The conflict between the Equal Access Act and the Washington Constitution presents an actual controversy and is not "speculative" nor is the question presented "hypothetical."

Respondents erroneously contend that the conflict between the Equal Access Act and the Washington Constitution is "entirely speculative" (Resp. Br. 2) and also that the Petition for Writ of Certiorari raises "an entirely hypothetical question" (*id.* at 9). It is clear from Judge Farris' Concurring Opinion that the conflict between the Act and the Washington Constitution is not speculative, and the following question presented by the Petition is anything but hypothetical:

> Where the Equal Access Act does not expressly preempt state constitutions, does it *implicitly* preempt the Washington constitutional provisions that repeatedly have been construed by the Washington Supreme Court to absolutely

---

[1] The Ninth Circuit's Opinion, by Judge Farris, is *Garnett v. Renton School Dist. No. 403*, 987 F.2d 641 (9th Cir. 1993) (Pet. App. A). The Concurring Opinion of Judge Farris is at 987 F.2d 646-48 (Pet. App. A-14-17).

> prohibit *any* entanglement between public schools and religion and that were construed by the District Court in this matter to preclude Respondents' religion club from meeting at a Washington public high school?

That question needs to be resolved by this Court because there can be no doubt that, as Judge Farris observed in his Concurring Opinion (987 F.2d at 647; Pet. App. A-15-16), the Washington Supreme Court repeatedly has construed the Washington Constitution to bar the type of entanglement sought by Respondents. Indeed, as Judge Farris noted, in *Witters v. Comm'n for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119, 1122 n.11, *cert. denied*, 493 U.S. 850 (1989), the Washington Supreme Court cited with approval the District Court's interpretation of the Washington Constitution *in this matter*. Furthermore, as noted in the Petition (at p. 7) and also in the Ninth Circuit's Opinion (987 F.2d at 646; Pet. App. A-12) and Respondents' Brief (p. 6 n.4), the question raised in the Petition is likely to recur because of similar constitutional provisions in a number of other states.

2. The Ninth Circuit did not base its decision on an express preemption of the Washington Constitution by the Equal Access Act but instead on an implied preemption.

Respondents are manifestly wrong in asserting that "[t]his is a case of express preemption." (Resp. Br. 3 n.1) The Ninth Circuit expressly ruled that "[t]he [Equal Access Act] does not explicitly preempt state law." (987 F.2d at 644; Pet. App. A-8) The Ninth Circuit's Opinion leaves no doubt that the basis for its decision was an

implicit preemption of the Washington Constitution by the Equal Access Act.

Respondents assert that the Supremacy Clause makes clear that state constitutional law is susceptible to federal preemption and that Petitioners cite no authority that examines the legitimacy of federal statutory preemption of state constitutional provisions. (Resp. Br. 8) Petitioners cited no such authority because, as the Petition for Writ of Certiorari makes clear, Petitioners are not questioning the legitimacy of the doctrine of preemption in general.

The issue that this Court should review is whether the Equal Access Act *implicitly* preempts the Washington Constitution. Respondents ignore this Court's decision in *Northwest Pipeline v. Kan. Corp. Com.*, 489 U.S. 493 (1989), in which the Court ruled that federal law preempts state law under the Supremacy Clause only in certain situations, none of which is present in this matter:

> In the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.

Id. at 509.[2]

---

[2] Respondents assert (at Resp. Br. 3-7) that Petitioners (and the District Court) put misplaced reliance on Sections 4071(d)(5) and (7) of the Equal Access Act as evidence that Congress did

3. Petitioners' and the District Court's interpretation of the Washington Constitution is both plausible and correct.

Respondents contend that Petitioners' (and the District Court's) interpretation of the Washington Constitution is "highly implausible" (Resp. Br. 9), that there is no basis for Petitioners' "extraordinary claim" that to allow Respondents' religion club on the public high school campus would violate the Washington Constitution (*id.*), and that Petitioners (and the District Court), in interpreting the Washington Constitution as they do, "take the idea to the point of absurdity" (*id.*). Respondents' hyperbole notwithstanding, even Judge Farris (who authored the Ninth Circuit's Opinion) in his Concurring

---

not intend for the Equal Access Act to comprehensively occupy an entire field of regulation and specifically referred in those sections to the continuing effectiveness of state laws and constitutional rights. For the reasons discussed in the Petition (at pp. 10, 11 n.6), Petitioners believe that Congress did not intend the Equal Access Act to preempt a state constitution like Washington's. In that same regard, Respondents' reliance on *Alverado v. Washington Public Power Supply*, 111 Wash. 2d 424, 799 P.2d 427 (1988), is misplaced because the Washington Supreme Court based its decision in that case on a decision of this Court where the Court concluded unequivocally that the entire field of nuclear safety concerns was preempted by the federal law and that there was simply no room for the application of state law to matters affecting nuclear safety. As discussed at pages 16-17 of the Petition, that is not the case regarding public education, a field that traditionally has been occupied comprehensively by the state.

Opinion clearly expressed his agreement with the interpretation of the Washington Constitution advanced by Petitioners and the District Court:

> Judge McGovern [the District Court Judge] concluded that the Washington State Constitution bars religious student groups from meeting on public high school campuses. I agree.

(987 F.2d at 646; Pet. App. A-14)

While Judge Farris joined the majority of the Ninth Circuit "only because I am equally convinced that Congress intended to preempt state law" (*id.*), he devoted the balance of his Concurring Opinion to explaining why he is "satisfied that Judge McGovern properly concluded that the Washington State Constitution prohibits the relief requested by [Respondents]." (987 F.2d at 647; Pet. App. A-15) In doing so, Judge Farris carefully surveyed and discussed several decisions of the Washington Supreme Court that support Petitioners' and the District Court's interpretation of the Washington Constitution in this matter.

4. Contrary to Respondents' contention, there are no "free speech rights on public property" involved in this matter.

Respondents erroneously contend that their club's activities involve "free speech rights on public property, without official preference or endorsement." (Resp. Br. 6, 9) Respondents obfuscate the issue before this Court. Indeed, Judge Farris noted in his Concurring Opinion that there are no "free speech" rights involved here, as the Washington Constitution "does not bar an open

exchange of ideas [but] merely restricts 'religious' groups from meeting on school grounds." (987 F.2d at 647; Pet. App. A-17)

Respondents also mislead this Court in asserting that the activity of their religion club would be "without official preference or endorsement" of School District officials. (Resp. Br. 9) Respondents ignore the undisputed fact that all of the student clubs that Petitioners allow on their school campus meet pursuant to a formal School District Policy and as officially recognized and formally authorized student clubs. On that basis, Judge Farris, in his Concurring Opinion, stated his agreement with the District Court's ruling that the Washington Constitution would be violated if Respondents' religion club were allowed to meet on the campus:

> [Respondents' religion club] requests a much more substantial use of school facilities and funds than that allocated [and rejected by the Washington Supreme Court] in *Perry [v. School District No. 81*, 54 Wash. 2d 886, 344 P.2d 1036 (1959)]. The . . . Court [in *Board of Education v. Mergens*, 496 U.S. 226 (1990),] held that the [Equal Access Act] requires schools to permit student religious groups to meet on the same terms as other student groups that are part of the limited open forum. 496 U.S. at 247. Therefore, [Petitioners] must allow the student religious group "access to the school newspaper, bulletin boards, the public address system, and the Annual Club Fair," *id.*, if the school permits other student groups to do the same. The school would need to assign a teacher to each meeting of the student religious club for custodial purposes. The Washington Supreme Court flatly

> rejected a more minimal use of the school facilities and personnel in *Perry*. Moreover, the Washington Supreme Court cited with approval the District Court's interpretation of the Washington Constitution in *Garnett [v. Renton School District No. 403*, 675 F. Supp. 1268 (W.D. Wash. 1987)]. *Witters v. Comm'n for the Blind*, [*supra*].

(987 F.2d at 647; Pet. App. A-16)

Judge Farris, in his Concurring Opinion, concluded that "there is a sound basis for the barrier erected by . . . the Washington State Constitution." (987 F.2d at 647; Pet. App. A-16-17) He lamented the intrusion of the Court's decision on state sovereignty and the ability of a state "to maintain a sturdier wall between church and state than the barrier recognized by [this] Court." (987 F.2d at 648; Pet. App. A-17)

Conclusion

The Petition for Writ of Certiorari does not present a "purely hypothetical problem." (Resp. Br. 10) The Petition presents a question of exceptional public importance that is likely to recur in other states with similar restrictive constitutional provisions barring religious meetings on public school grounds. This Court should grant certiorari to decide whether Congress, in enacting the Equal Access Act, meant to preempt those state constitutional provisions and intrude upon the sovereign power and comprehensive authority of Washington and other states with

similar constitutional provisions to prescribe and control the conduct of public schools.

DATED: August 11, 1993.

Respectfully submitted,

I. FRANKLIN HUNSAKER, III*
SCOTT M. STICKNEY
BULLIVANT, HOUSER, BAILEY,
PENDERGRASS & HOFFMAN

Attorneys for Petitioners

* Counsel of Record